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industry. There is nothing in the comments specifically or in the record generally that justifies even a suspicion, much less a finding, of speculation.

Only two commenters assert the existence of speculation problem at 39 GHz.² The Personal Communications Industry Association ("PCIA") alleges that there was "a wave of speculative filings" for 39 GHz authorizations³, and Telco Group, Inc. ("TGI") complains of a "stampede" of "spectrum speculators."⁴ But neither offers any support for these allegations. Rather, much like the Commission's statements in the *NPRM*, they merely allege a speculation problem and then, without any critical examination of the allegation, move right on to "fix" it. Such *ipsi dixit* reasoning is contrary to the public interest and procedurally improper.

To the extent there is any improper speculation (as opposed to proper entrepreneurship) occurring in the 39 GHz band, the Commission already has adequate enforcement mechanisms to deal with it. If an application fails to satisfy established threshold requirements, the Commission may summarily dismiss it.⁵ If it appears that a particular applicant's proposal would not serve the public interest, the Commission has the statutory authority (indeed, the obligation) to set the application for hearing rather than grant it.⁶ After grant, the Commission has the authority and the procedural means for addressing apparent speculation through enforcement of construction deadlines⁷ and anti-trafficking provisions.⁸

² A third commenter, Advanced Radio Telecom Corp. ("ART") alleges that "several groups of permittees . . . coordinated applications for 'friends and family' in a carefully (and successfully) orchestrated scheme to obtain grants of multiple channels in the same market," *ART Comments* at 11, an accusation apparently aimed at BizTel, Inc. which ART claims "has a relationship through options and family or business relationships with more than a dozen applicants. *Id.* at 31 n.41. Even if this is true, it would represent an affirmative abuse of Commission processes by a single applicant and its affiliated "shills," not an indication of widespread speculation. The Commission should address such a case on its own merits and, if it finds wrongdoing, deal with the perpetrators accordingly. It should not, however, use the mere allegations of abuse by a single entity as the basis for imposing onerous and unfair restrictions on the entire group of 39 GHz incumbent permittees and applicants.

³ *PCIA Comments* at 2.

⁴ *TGI Comments* at 4.

⁵ *United States v. Storer Broadcasting*, 351 U.S. 192 (1956).

⁶ 47 C.F.R. § 309(d)(1).

⁷ 47 C.F.R. § 21.43(a) (amended in WT Docket No. 94-148 and to be recodified as 47 C.F.R. § 101.63).

⁸ 47 C.F.R. §§ 21.38 & 21.39 (amended in WT Docket No. 94-148 and to be recodified as 47 C.F.R. §§ 101.53 & 101.54).

There is no basis in this record or elsewhere of widespread 39 GHz speculation that would justify its being a factor in this rulemaking. Neither the Commission, PCIA, nor TGI identify a single specific applicant as an alleged speculator, calling this bare accusation into further doubt. If the Commission sincerely suspects one or more specific parties of improper speculation, they should be identified so they can answer the charge. But it is entirely improper for the Commission to rely on nebulous and undocumented assertions of speculation as the basis for adopting rules of general applicability—rules that are, in effect, punitive measures against all 39 GHz applicants, including bona fide entrepreneurs who are attempting to introduce new competition and develop new and innovative services.

II. THE COMMISSION SHOULD NOT OVEREMPHASIZE THE ROLE OF CMRS INTERMEDIATE LINKS.

In its comments, Bachow urged the Commission to correct its apparent overemphasis on the potential use of the 37-39 GHz band to provide intermediate links for PCS, cellular, wide area SMR, and other CMRS systems. Bachow acknowledged that the 37-39 GHz band may be used for CMRS infrastructure (and other traditional point-to-point applications), but suggested that the Commission not preordain any one category of use. Rather, the Commission should create a flexible regulatory environment conducive to the development of a wide variety of new, innovative, and competitive 37-39 GHz band services. Bachow further cautioned the Commission that earmarking even a portion of this allocation for exclusive CMRS eligibility or use would be an inefficient use of spectrum.

The comments are largely in accord with Bachow's position in this regard. Many commenters discussed various intended and potential uses of this band other than CMRS infrastructure support.⁹ A small minority advocate a specific set-aside of channels exclusively for

⁹ *E.g., BizTel, Inc. Comments* at 11-14; *No Wire L.L.C. Comments* at 2-3; *WinStar Communications, Inc. Comments* at 6-9; *Ameritech Corporation Comments* at 2-3 (Ameritech cites potential use for LEC-to-CMRS interconnection rather than merely CMRS backbone).

PCS and/or CMRS providers,¹⁰ but they offer no justification for such speculative warehousing of large chunks of 37-39 GHz spectrum. They do not demonstrate the actual need on the part of CMRS providers for the amount of bandwidth requested, nor do they demonstrate that spectrum in the 37-39 GHz band is adequate to satisfy their requirements. A set aside exclusively for CMRS providers will result in either inefficient use (or nonuse) of the spectrum or, assuming the CMRS provider puts the capacity to use in for things other than backhaul or backbone, an unjustified windfall to the CMRS provider.¹¹

As Bachow noted in its comments, a variety of microwave bands, as well as non-RF solutions, are required to satisfy the backhaul and backbone requirements of most CMRS systems, and these needs cannot be met solely within the 37-39 GHz band. Moreover, even assuming a CMRS operator could satisfy all of its infrastructure needs within the 37-39 GHz band, even a fully developed CMRS system is not likely to require the bandwidth represented by even a 50 MHz channel.¹² Potential non-CMRS uses (e.g., video conferencing), on the other hand, will likely require the bandwidth of multiple channels to fulfill their requirements. In other

¹⁰ AT&T Wireless asks for a set-aside of 9 paired 37 GHz channels exclusively for broadband PCS providers. PCIA wants a set-aside of 6 paired channels for PCS and another 8 paired channels for CMRS generally. Telephone and Data Systems, Inc. proposes a scheme whereby 6 paired channels will be reserved for link-by-link licensing to broadband PCS providers until three months after issuance of the last broadband PCS authorization, and an additional 8 paired channels would be reserved for link-by-link licensing to broadband PCS, cellular, and/or wide-area SMR providers for three years after adoption of the new rules.

¹¹ AT&T Wireless expresses concern that, absent a set-aside, the PCS providers may be required to obtain service from non-CMRS 37-39 GHz licensees, thereby increasing the cost of providing PCS service. *AT&T Wireless Comments* at 4. Bachow disputes this assertion. Insofar as only a fraction of even a single paired 37-39 GHz channel would be consumed by the infrastructure requirements of the typical CMRS system (see discussion in text above & *Bachow Comments* at 7-9), a non-CMRS provider would actually be able to fulfill the CMRS carrier's requirements at a lower cost by realizing the economies of scale from using the entire allocation to fulfill the needs of a variety of different users. While the CMRS provider might also put the spectrum to other uses (i.e., sell excess capacity to other non-CMRS entities) thereby achieving similar economies of scope, there is no justification for awarding the CMRS provider preferential status in this regard.

¹² With current technology, a single 50 MHz channel at 37-39 GHz can provide a bi-directional DS-3 capacity (the equivalent of 28 T-1's). Equipment improvements anticipated in the very near future will increase this capacity by a factor of three.) Capacity is further multiplied by frequency reuse throughout the CMRS service area. Reuse algorithms can be much more aggressive for point-to-point backbone networks given the highly directional nature of the signals involved. There is every reason, therefore, to be skeptical about CMRS interest assertions of a need for exclusive access to large chunks of 37-39 GHz spectrum.

words, earmarking any portion of the 37-39 GHz allocation exclusively for CMRS infrastructure support would be a highly inefficient non-use of the spectrum.

Bachow therefore once again urges the Commission to abandon its overemphasis on CMRS backbone and backhaul functions, and instead to adopt a regulatory structure that does not favor any one particular use. This will allow competitive market forces to dictate the particular uses of 37-39 GHz spectrum that will best meet public needs and requirements without artificial pressures in the form of governmental allocation restrictions.

III. FAIR AND REASONABLE TREATMENT OF INCUMBENT 39 GHZ APPLICANTS AND LICENSEES

A. Processing of Pending Mutually Exclusive Applications

The various commenters were virtually unanimous in their position that the Commission should afford an opportunity for the resolution of remaining conflicts between pending 39 GHz applications.¹³ Even the Telecommunications Industry Association, who initiated this rulemaking proceeding based in part on its concern that increased application and licensing activity in the 39 GHz band might prematurely exhaust the spectrum, urges the Commission to afford grandfathered status to all pending applicants and to allow amendments to resolve any remaining conflicts. *TIA Comments* at 12-15. At least two commenters are also expressly in agreement with Bachow's position that the Commission should dismiss any pending applications that do not comply with the Commission's September 16, 1994, Public Notice regarding the

¹³ *E.g., Ameritech Corporation Comments* at 3-6; *AT&T Wireless Services, Inc. Comments* at 12-13; *CommCo Comments* at 3-4; *GHz Equipment Company, Inc. Comments* at 5; *Sintra Capital Corporation Comments* at 2; *No Wire L.L.C. Comments* at 7-10; *Altron L.C. Comments* at 2; *Microwave Partners Comments* at 7-10; *DCT Communications, Inc. Comments* at 30-34; *Spectrum, L.C. Comments* at 2-3; *Milliwave Limited Partnership Comments* at 28-29. Only a few commenters who are adverse to the interests of the 39 GHz incumbents advocated a different view. *E.g., Telco Group, Inc. and GTE Service Corporation.*

number of channels requested and the size of the proposed service area.¹⁴ Bachow thus reaffirms its position that the Commission immediately dismiss all noncompliant applications and thereupon give the remaining applicants a chance to resolve any conflicts.¹⁵

B. Fair and Reasonable Build-Out Requirements

There is virtual unanimity among the parties that the Commission's proposed build-out requirement for grandfathered 39 GHz licensees are too onerous and otherwise contrary to the public interest. While some parties struggle to devise alternative objective performance standards based on links-per-area, population density, or a combination, a great number are in accord with Bachow's position that licensees not be subject to any particular objective criterion, but rather be obligated to demonstrate on a periodic basis that they are making "efficient and substantial use of the spectrum."¹⁶

Bachow submits that the more flexible "efficient and substantial use" approach is much more appropriate than a strict objective performance standard. It is consistent with the general policy favoring technical flexibility. It gives the licensee the latitude to deploy a system truly responsive to unique customer requirements rather than artificially imposing a specific construction timetable and system design that must be met merely to preserve an authorization. Moreover, and as explained in detail in Bachow's comments, the "efficient and substantial use"

¹⁴ *Ameritech Corporation Comments* at 1 & 2-4; *Milliwave Limited Partnership Comments* at 28-29. *Commco, L.L.C. ("Commco")* suggest an alternative approach whereby, at the end of a specified negotiation period, the Commission would act to reduce any pending multi-channel request to a single channel application. *Commco Comments* at 3-4. This is not a fair solution—it still places compliant applicants in an unfair negotiating position *vis-a-vis* noncompliant applicants. Moreover, it is unlikely to be a workable solution. It requires the Commission to select the channels to be eliminated/retained and also fails to address the issue of pending requests for service areas in excess of the 50 square mile standard. The better approach is to simply dismiss the noncompliant applications.

¹⁵ As to how long the Commission should give applicants to resolve their differences, the suggestions of the commenters range from 3 to 6 months. Bachow believes 3 months will be adequate if the Commission first dismisses the noncompliant applications. If, on the other hand, Bachow and other compliant applicants are required to negotiate with applicants who continue to maintain multiple channel proposals, a minimum of 6 months should be allowed.

¹⁶ *E.g., Commco, L.L.C. Comments* at 8; *AT&T Wireless Comments* at 6-9; *Milliwave Limited Partnership Comments* at 17-23; *GHz Equipment Co., Inc. Comments* at 4; *Harris Corporation-Farion Division Comments* at 2; *Sintra Capital Corporation Comments* at 4; *Altron Communications, L.C.* at 2; *Spectrum Communications, L.C.* at 2.

standard recognizes and accommodates the significant differences between the likely 37-39 GHz microwave services and other services for which the Commission has adopted objective buildout requirements. Cellular, PCS, and similar services involve constructing facilities to serve a large geographic area and that will be used in common by all subscribers. Such systems can be designed and deployed based on the *anticipated* needs of *potential* customers. The services to be provided at 37-39 GHz will involve the deployment of facilities dedicated to the use of individual subscribers, with both the system design (in terms of location, bandwidth, etc.) and deployment schedule being dictated by the actual individual user. To superimpose artificial deployment requirements on such a service will inevitably result in inefficiencies detrimental to the service and adverse to the public interest.¹⁷

Respectfully submitted,

Bachow and Associates, Inc.

By: 
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Dated: 1 April 1996

Certificate of Service

I, Robert J. Keller, hereby certify that I have, on this 1st day of April 1996, caused copies of the foregoing *Reply Comments of Bachow and Associates, Inc.* to be sent via First Class, United States mail, postage prepaid, to all parties of record in this proceeding.

By: 
Robert J. Keller

¹⁷ Bachow is also in full agreement with the commenters who urged that whatever performance standard is adopted should apply equally to grandfathered 39 GHz licensees and new 37-39 GHz licensees.